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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SHEREEN MCDADE,

Plaintiff and Respondent,

v.

TRUDE LEE ASH,

Defendant and Appellant.

B205215

(Los Angeles County
Super. Ct. No. BC367134)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Richard L. Fruin, Jr., Judge. Affirmed.

Greenberg Glusker Fields Claman & Machtinger, Michael A. Greene and
Rachel J. Wilkes for Defendant and Appellant.

Appleton, Blady & Magnanimo and Heather Appleton for Plaintiff and
Respondent.

Trude Lee Ash (Ash) appeals a declaratory judgment in favor of respondent Shereen McDade (McDade). The trial court ruled that the lien Ash filed against McDade's judgment in an underlying action was extinguished when McDade dismissed the action and proceeded in arbitration. According to Ash, the trial court erred because the lien attached to the underlying action and remained valid because the dismissal violated Code of Civil Procedure section 708.440;¹ California should adopt a rule that when an action is dismissed after being sent to arbitration, the lien attaches to the arbitration; and McDade was barred from obtaining a declaration in her favor by the doctrines of waiver and estoppel.

We find no error and affirm.

FACTS

Ash is the biological mother of McDade and the trustee of the Joseph C. and Trude Lee Ash Trust (Trust). Following a probate action entitled *In re the Joseph C. and Trude Lee Ash Trust* (Super. Ct. L.A. County, No. BP048688) (Probate Action), Ash obtained an amended judgment for \$1,637,537.80 against McDade.

Approximately four years later, McDade sued her employer in *McDade v. Advantage Infiniti of Santa Monica* (Super. Ct. L.A. County, No. BC323113) (Underlying Action). The Underlying Action was ordered to arbitration. Subsequently, Ash filed a notice of lien to enforce her judgment in the Probate Action. Notice of the lien and the amount (then up to \$2,865,930) was served on June 2, 2006. McDade dismissed the Underlying Action on October 31, 2006.

Following the dismissal, McDade sued for declaratory relief, alleging: "An actual controversy has arisen and now exists relating to the rights and duties of the parties [in] that Ash contends that the [lien] is valid and enforceable against any recovery obtained by [McDade] in the contractual arbitration hearing of the claims asserted in the Underlying Action and [McDade] contends that the [lien] is not enforceable because the

¹ All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

pending contractual arbitration is not an ‘action’ or ‘special proceeding’ as required for enforcement under Code of Civil Procedure[,] § 708.410.” McDade requested a declaration that the lien was not enforceable. Ash filed a cross-complaint seeking a contrary declaration.

Both parties filed motions for judgment on the pleadings. McDade prevailed on her motion. Judgment was entered for McDade.

This appeal followed.

STANDARD OF REVIEW

We review the granting of judgment on the pleadings under the standards applicable to a judgment following the sustaining of a demurrer. (*Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 955.) Our task is to independently analyze the sufficiency of the pleading on its face while accepting that the allegations are true. (*Ibid.*; *Foundation For Taxpayer & Consumer Rights v. Nextel Communications, Inc.* (2006) 143 Cal.App.4th 131, 135.)

DISCUSSION

1. The lien is not attached to the Underlying Action.

The parties dispute whether McDade had the unilateral right to dismiss the Underlying Action without Ash’s written consent or a court order. Ash impliedly suggests that because the dismissal was improper, the lien still attached to the Underlying Action. But Ash never challenged the dismissal. For our purposes, it is final and not subject to collateral attack. Thus, regardless of whether the dismissal was proper, there is no trial court action to which the lien can attach.

“A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien . . . to the extent required to satisfy the judgment creditor’s money judgment” on any cause of action for money or property and the judgment debtor’s right to any money or property under a judgment in that action or proceeding. (§ 708.410, subd. (a).) Unless a judgment creditor’s money judgment is satisfied or a lien is released, a judgment in an action or special proceeding in favor of a judgment debtor may not be enforced, and the action or

special proceeding cannot be settled or dismissed without the judgment creditor's written consent or court order. (§ 708.440, subd. (a).)

Assuming for the sake of this appeal that the trial court should not have entered dismissal for McDade, we have the following question: What is the consequence to the parties? In general, a plaintiff has a right to dismiss an action with or without prejudice prior to the commencement of trial. (§ 581, subd. (b)(1).) A plaintiff, however, does not have a right to dismiss an action once a defendant files a cross-complaint that seeks affirmative relief. (§ 581, subd. (i).) If a plaintiff ignored section 581, subdivision (i) and dismissed an action, case law suggests that the cross-complainant must move to set aside the dismissal under section 473. (*Roski v. Superior Court* (1971) 17 Cal.App.3d 841, 845–846.) In other words, there must be a direct attack. Certainly a lienholder would be in similar shoes. But Ash did not move to set aside the dismissal as a violation of section 708.440, subdivision (a). In other words, Ash did not seek to undo the dismissal and reinstate the Underlying Action. At this point, the Underlying Action does not exist and cannot give Ash's lien life.

Ash places reliance on *Oldham v. California Capital Funds, Inc.* (2003) 109 Cal.App.4th 421 (*Oldham*). In *Oldham*, the trial court approved a settlement between a judgment debtor and a third party. The lienholder appealed. In reversing, the appellate court found that the trial court abused its discretion under section 708.440 because it did not analyze whether the settlement was designed to deprive the judgment creditor of the benefit of its lien. (*Oldham, supra*, 109 Cal.App.4th at pp. 433–435.) *Oldham* offers Ash no assistance. The lienholder in *Oldham*, unlike Ash, launched a direct challenge to the violation of section 708.440. The holding in *Oldham* cannot be contorted to authorize a declaration that a dismissal in a previous action was improper and that the previous action is reinstated.

2. The lien did not attach to the arbitration.

Ash argues that the lien attached to the arbitration. In other words, she contends that the arbitration is an action or special proceeding. McDade contends that it could not

attach to the arbitration because it is not an action or special proceeding within the meaning of section 708.410, subdivision (a).

We agree with McDade.

There are two classes of judicial remedies identified in the Code of Civil Procedure: actions and special proceedings. (§ 21.) An action is “an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” (§ 22.) “Every other remedy is a special proceeding.” (§ 23.) Using these definitions, it has been held that a contractual arbitration is “neither an action nor a special proceeding” for purposes of a lien designed to enforce an attachment. (*Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp.* (1994) 29 Cal.App.4th 1459, 1466–1467 (*Jordan-Lyon*)). This interpretation makes sense because arbitrations are not judicial remedies. Like *Jordan-Lyon*, we conclude that arbitrations do not fall within the definition of an action or special proceeding. Thus, Ash did not obtain a lien on the arbitration.

Acknowledging *Jordon-Lyon*, Ash contends that it “*expressly stated* that it was not deciding whether a lien was valid where, as here, the case began in the [trial court] and was ordered to arbitration over the plaintiff’s objection.” Based on this assertion, Ash argues that there is an open question regarding whether a lien can attach to an arbitration, i.e., there is an open question as to whether arbitrations are actions or special proceedings. We cannot concur.

Jordon-Lyon stated: “In this case there were no related petitions filed in the [trial court] to compel arbitration [citation], or to confirm, correct or vacate the award, [citation]. Thus, we do not address the issue of the availability of a section 491.410 lien in any such proceeding.” (*Jordon-Lyon, supra*, 29 Cal.App.4th at pp. 1466–1467, fn. 4.) The only open question in *Jordan-Lyon* was whether a petition to compel arbitration, or to confirm, correct or vacate an award, could be construed as an action or special proceeding for purposes of obtaining a lien. It specifically held arbitrations are not actions or special proceedings.

3. Waiver and estoppel do not apply.

Ash posits the following: “Because the [lien existed] and was not properly dismissed, the affirmative defenses of waiver and estoppel bar McDade from obtaining a declaration that the lien is invalid.”

Aside from the merits, Ash failed to clear one of the principal hurdles on appeal. She was obligated to support her argument with legal authorities. Because she failed to do so, we may deem her arguments abandoned. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

On the merits, Ash’s position is unavailing. The lien ceased to exist when the Underlying Action was dismissed. This defeats her argument. According to Ash, McDade waived her right to arbitrate by filing the Underlying Action. Whether that is true is moot. McDade’s employer petitioned to compel arbitration and the petition was granted. That order has not been challenged, and Ash failed to explain how she has standing to object to it.

Next, Ash claims: “McDade is barred from seeking a declaration of the [lien’s] invalidity by the affirmative defense of estoppel. Ash relied on McDade’s filing of the Underlying Action and its pendency in filing and giving notice of her [lien]. Ash relied to her detriment.” We find these assertions lacking. Equitable estoppel requires that: ““(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.”” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) Ash made no attempt to demonstrate that any of these elements are present. Notably, we fail to see how filing the lien caused Ash injury. Any claim of injury is hollow. She is in exactly in the same position she was before the Underlying Action and lien were filed.

DISPOSITION

The judgment is affirmed.

McDade shall recover her costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ